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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 306

FORTNER ENTERPRISES, INC., - - *Petitioner,*

v.

UNITED STATES STEEL CORPORATION, U. S. STEEL HOMES CREDIT CORPORATION, - - - - - - - - *Respondents.*

BRIEF FOR PETITIONER.

CITATIONS TO OPINIONS BELOW.

The Memorandum Opinion-Judgment of the District Court is unreported (309a) and for ready reference is printed in Appendix "A" hereto, *infra,* App. A 39. The judgment of the District Court is unreported (322a), and is printed in full in Appendix "A" hereto, *infra,* App. A 52. There was no opinion of the Circuit Court of Appeals for the Sixth Circuit. An Order was entered by the Court on April 26, 1968 affirming the judgment of the District Court and said Order appears in the Record (page 5), and is printed in Appendix "B" hereto, *infra,* App. B 53. Said Order is not reported. The Petition for Writ of Certiorari was filed on July 18, 1968 and sustained on October 14, 1968.

JURISDICTION.

The Judgment of the Circuit Court of Appeals was entered on April 26, 1968, App. "B," *infra,* App. B 47. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

STATUTES INVOLVED.

The statutes involved are Sections 1 and 2 of the Sherman Antitrust Act, 15 U. S. C. 1 and 15 U. S. C. 2, and Sections 4 and 16 of the Clayton Act, 15 U. S. C. 15 and 15 U. S. C. 26. The foregoing are printed in Appendix "C," *infra,* App. C 54.

QUESTIONS PRESENTED.

I. May a Federal Court in an antitrust suit charging a contract, combination and conspiracy to restrain commerce and an illegal tie-in agreement in violation of Section 1 of the Sherman Act and a conspiracy to monopolize in violation of Section 2 of the Sherman Act dismiss such a suit through Summary Judgment procedures when ample evidence was in the record to support all elements of the charges as set forth in the established cases?

II. When large and wealthy companies such as United States Steel Corporation and its credit subsidiary U. S. Steel Homes Credit Corporation lend money to borrower under unique and unusual terms not available elsewhere to obtain mortgages and loan agreements which require borrower (Fortner Enterprises, Inc.)

". . . to erect on each of said Lots . . . . a prefabricated dwelling house manufactured by United States Steel Homes Division, United States Steel Corporation . . ." is there created an illegal tying agreement in violation of Section 1 of the Sherman Act?

III. Is a minimum of $678,000.00 of sales or obligations to purchase of a tied product a not insubstantial amount of interstate commerce to satisfy the second element of an illegal tie-in agreement and should the Federal Courts have applied a share of the market test to a case involving a tie-in agreement?

STATEMENT OF THE CASE.

1. The Facts.

The Petitioner, Fortner Enterprises, Inc., was a corporation in existence in 1959 principally owned by Mr. A. B. Fortner, who also had an interest in another corporation which owned some highly desirable land suitable for residential development. It was located in Louisville, Kentucky. The engineering on this land had been done and the necessary approval had been obtained from the appropriate zoning authority (Document 54, 385a, 392a).

United States Steel Corporation (henceforth called U. S. Steel), at that time had a division called the "Homes Division" with a plant in New Albany, Indiana, just across the Ohio River from Louisville, Kentucky. U. S. Steel also at that time had a separate wholly owned corporate subsidiary called U. S. Steel

Homes Credit Corporation (henceforth called Credit Corporation).

U. S. Steel's Homes Division manufactured or purchased and sold prefabricated house packages and their component parts. U. S. Steel would franchise builders who would buy and erect the U. S. Steel homes in subdivisions.

The Credit Corporation was formed in 1954 upon authorization of the Finance Committee of U. S. Steel (753a). The minutes of that meeting authorized capital of $5,000,000.00 to be used to provide construction and mortgage financing to dealer-builders (753a). This corporation was to be operated on a sound financial basis entirely independent of U. S. Steel (754a). A document attached to those minutes from United States Steel Homes, Inc. (the predecessor of the Homes Division) states that sales of homes would be stimulated, but it then emphasized that "It is understood, however, that the finance corporation will be used to render financial service requested by dealer-builders and will not be used as a means to force sales to dealer-builders" (758a).

The above principles of operation were changed in December, 1958, according to the Finance Committee minutes of December 16, 1958 (763a). A program was approved at that time to enable the Homes Division to attain a minimum distribution of 1,800 house packages in 1959. This program was to be effectuated by making loans above and beyond their conventional construction and home mortgage loans, without conformity with conventional or conservative patterns (764a). In

turn, the Homes Division would underwrite any Credit Corporation losses (764a).

This program of special type loans for land acquisition and development and construction was approved and expanded by U. S. Steel through 1962 (764a through 766a).

In 1959, the first year the special financing program was put into effect by the Credit Corporation after approval by U. S. Steel, Mr. A. B. Fortner, President of the Petitioner Fortner Enterprises, Inc., was approached by representatives of U. S. Steel who wanted to get him to develop the available land and build U. S. Steel homes thereon (289a, 290a, 438a).

A memorandum in the U. S. Steel files recommends that the matter be pursued, although in the special financing category (385a through 388a). On the basis of that memorandum, the President of the Homes Division of U. S. Steel wrote the president of the Credit Corporation on December 30, 1959 (389a), requesting the Credit Corporation to negotiate with Plaintiff in order to assist in providing additional shipments of home packages in the Louisville area in 1960.

The negotiations proceeded sporadically until September, 1960. The homes were not particularly attractive to Petitioner but the representatives of Credit Corporation made very attractive offers of financing until they arrived at the point that they offered to provide maximum financing for land acquisition and development (290a). Coupled with the offer of financing was a condition that Petitioner only purchase and erect on the lots in Petitioner's subdivision homes man-

ufactured and sold by U. S. Steel (290a). This offer of financing was so unusual and unique insofar as Petitioner was concerned that through economic necessity it was accepted (290a). Not only was this type of financing unique to Petitioner, it was unique in financing circles generally in the Louisville, Kentucky area in 1960 when it was made and accepted according to the affidavit of one of the leading mortgage lenders in the Louisville area (294a, 295a). Such loans were not available under the terms made at that time from any other source.

Certain written agreements were then made including a loan agreement signed on October 28, 1960 (24a, 291a), and mortgages were signed by Petitioner (39a-46a). The instruments were between Petitioner and Credit Corporation. U. S. Steel was not a *party* to them. But the loan agreement specifically required Petitioner to erect a prefabricated home manufactured by U. S. Steel on each lot in the subdivision (27a, 28a).

The financing was provided and the work was begun. Defects in and problems with the prefabricated houses appeared and multiplied. The problems with the homes got so bad that in the latter part of 1961 or early in 1962, Petitioner requested Credit Corporation to relieve Petitioner of the restrictive portion of the loan agreement which required Petitioner to erect on each lot a U. S. Steel home (26a), but this was refused (291a) and Petitioner was told it would have to continue with the U. S. Steel homes.

The record contains a voluminous listing of the complaints and defects in the house packages attributed to U. S. Steel (118a through 127a; 527 a through 592a).

The problems with the houses continued to get worse and the subdivision of Petitioner had by then obtained a bad reputation. On May 31, 1962, representatives of Petitioner and both Respondents met and Respondents were again requested to allow Petitioner to build conventional homes so Credit Corporation could be paid but this was met with an adamant refusal (293a) and threats of foreclosure on the mortgages. Petitioner as of June 6, 1962 had kept its account current with Credit Corporation (428a, 429a), but the coercion of Respondents and their insistence on enforcement of the tying agreement resulted in the filing of this antitrust suit in July, 1962, and the cessation of payments.

The uncontradicted evidence in the record is that the Credit Corporation in this and many other instances was used as a "tool" by U. S. Steel to obtain sales of its home packages (763a, 764a, 362a-364a), in spite of the fact that the original intent in the formation of the Credit Corporation was not to use it as a means to force such sales (756a-759a).

All loans made by Credit Corporation to finance the acquisition and development of real estate have the tying agreement in them as was described in a part of Credit Corporation's Answer to Interrogatory 17 (167a):

> "Loans made to finance the acquisition of subdivided real estate, or to finance the development of real estate as subdivisions, are made against mortgage security with provisions for partial releases of individual building lots upon satisfactory

> evidence that the lot has been improved with a residential structure utilizing products of United States Steel Homes Division, or upon satisfactory assurances that the lot is to be so improved."

The same provision also applies to loans made for house construction (167a, 168a).

The general purpose of Credit Corporation has been described by its Vice-President Dyas as (851a):

> "Well, the general purpose is to provide financial assistance to customers or dealers in which they apply for such assistance, and seem to be unable to obtain the same sort of assistance on reasonable terms from normal sources."

The President of the Credit Corporation has admitted that the loans to Petitioner were made to help U. S. Steel obtain a broader distribution in the Louisville market (839a), that the tie-in was used under the dictate of U. S. Steel (838a, 839a) and that it was Credit Corporation's intent so long as the loan agreements were in effect to require Petitioner to put U. S. Steel homes in Petitioner's subdivision (840a).

That the financing under the terms and conditions offered Petitioner and many others was unique and unavailable elsewhere can be found in the Homes Division Sales Manual (374a), which indicates that the ordinary financing program on land acquisition and development was a 60% loan (374a), with frequently a "prior sales" requirement of a certain number of sales before development money would be put forth (367a). Neither limitation was observed in the final offer to Petitioner. Significantly, the Sales Manual also points

out that the major competitors of the Homes Division made development loans at simple interest plus a 10% fee, whereas, the Credit Corporation charged simple interest plus a ½ point fee (377a).

The extent of the use of the Credit Corporation to force sales of homes packages to dealers is illustrated by the statistics in the record. The Credit Corporation, in 1960 made loans totalling $22,625,805 (675a) to achieve sales of home packages worth $3,971,217.76 (183a, 676a, 677a). For 1961 loans of $19,342,612.00 were made to achieve sales of $2,823,383.50. In 1962 loans of $19,283,544.00 were made to achieve sales of $2,289,819.00. All of these loans with insignificant exceptions (676a) were made with the restrictive tying agreement in the applicable loan agreements (167a). These loans accounted for 68% of Homes Division sales in 1960, 70% in 1961 and 75% in 1962 (676a and 677a).

The transaction with Petitioner involved loans or loan commitments in excess of $2,500,000.00 (25a, 244a) and obligated Petitioner to purchase 219 house packages (24a, 243a) at a minimum price of $3,100.00 each (350a), so the tying agreement with Petitioner alone involved a minimum of $678,900.00 of purchases of prefabricated homes.

Finally, the evidence shows that the house packages of the Homes Division cost Fortner Enterprises in 1961 and 1962 from $443.00 to $455.00 more than a comparable available competitive prefabricated house or a comparable conventional house (Affidavit of Herman Miles, 349a through 356a).

2. Proceedings Below.

This is a suit for damages and an injunction under Section 4 of the Clayton Act (15 U. S. C. 15) (App. C 35) and Section 16 of the Clayton Act (15 U. S. C. 26) (App. C 56). The damages claimed are for profits lost and the dimunition in the value of Petitioner's real estate as a result of the unwarranted foreclosure action as set forth in the Complaint (2a), and the Amended Complaint (239a).

The Complaint charging violation of Sections 1 and 2 of the Sherman Act was filed on July 19, 1962 (2a). Much discovery was had thereafter, principally by Petitioner, including interrogatories, numerous depositions and the production of numerous documents by Respondents. All of the pertinent material to Petitioner's cause appears in the two volume appendix in the record before this Court and is quite extensive. Matters involving foreclosure by the Credit Corporation on Petitioner's property consumed much time of the parties.[1]

The antitrust suit was finally set down for trial on July 6, 1966, in the District Court for the Western

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[1]The District Court granted Respondent Credit Corporation foreclosure on its counterclaim and Petitioner's property was sold although Petitioner has strongly contended that the foreclosure Judgment (192a), was not final under Federal Rule of Civil Procedure 54(b) since there was no certificate of "no just cause for delay" and no express directions for entry of judgment contrary to said rule and *Sears, Roebuck & Co.* v. *Mackey*, 351 U. S. 427, 100 L. Ed. 1297, and *Cold Metal Process Co.* v. *United Eng. & F. Co.*, 351 U. S. 445, 100 L. Ed. 1311, and a mere order separating issues for trial (173a and 174a) does not make such order final, *Atkins Kroll (Guam) Ltd.* v. *Cabreras* (C. A. 9th, 1960), 277 F. 2d 922.

District of Kentucky. On June 25, 1966, eleven days before the trial, Respondents filed their Motion for Summary Judgment (14a). On the morning the trial was to begin the Court elected to hear arguments on the Summary Judgment and decided that Summary Judgment would be granted. A request for "Findings of Fact and Conclusions of Law" was made to counsel for Respondents by the Court and this was tendered by Respondents on July 21, 1966 (15a, 297a-309a). Thereafter on September 7, 1966, the District Court filed his "Memorandum Opinion-Judgment Dismissing Complaint and Amended Complaint" (309a-322a; App. A 39-52) which is identical to the Respondents' tendered "Finding of Fact and Conclusions of Law" on the antitrust issues with insignificant exception. The Court's Memorandum Opinion was modified on October 5, 1966, ordering the Affidavits of Kenneth L. Anderson and Herman Miles to be filed (348a). A separate Judgment was entered dismissing Petitioner's suit on September 8, 1966 (16a, 322a), and the Notice of Appeal was filed on October 6, 1966 (17a, 770a).

This cause was briefed by the parties and subsequently argued on December 5, 1967 before the Sixth Circuit Court of Appeals.

On April 26, 1968, the Sixth Circuit Court of Appeals without opinion entered an order affirming the District Court judgment based on the District Court's Memorandum Opinion (App. A 53). The Petition for Writ of Certiorari was filed on July 18, 1968 and granted on October 14, 1968.

Summary of Argument.

Petitioner, Fortner Enterprises, Inc., plaintiff below, filed suit against Respondent United States Steel Corporation and its wholly owned subsidiary, U. S. Steel Homes Credit Corporation, alleging violations of Section 1 and Section 2 of the Sherman Act.

The underlying element of both charges involves loan agreements between Petitioner and the Credit Corporation which required Petitioner to build in its subdivision prefabricated houses manufactured and sold by the Homes Division of U. S. Steel as a condition to the loan of money for land acquisition and development. The loans were made to expand the sales of U. S. Steel and were a "tool" used to bait Petitioner and others into signing agreements committing them to purchase the U. S. Steel homes. The terms of the loans were unusual and unique at the time and unavailable elsewhere. This made such an economically attractive situation that Petitioner was compelled to accept the tying arrangement to obtain the loans. Thereafter the building program was started and the prefabricated houses had many defects resulting in poor sales and a bad reputation for the subdivision. Petitioner sought relief from the requirement to purchase from U. S. Steel but was emphatically rebuffed and threatened with foreclosure. After the second rebuff, this suit was filed.

The tie-in itself is admitted and is not in dispute. Economic power over the tying "product" is found in the unique terms under which the financing was offered

to Petitioner. A not-insubstantial amount of interstate commerce in the tied product, prefabricated houses, is found in the $678,900.00 of purchases of prefabricated houses which Petitioner made or was obligated to make from U. S. Steel.

The District Court rejected Petitioner's evidence or found it of no import or ignored it and entered Summary Judgment for Respondents. The evidence in the record either created issues of fact or established liability on the part of Respondents as a matter of law.

The evidence establishes a conspiracy between U. S. Steel and U. S. Steel Homes Credit Corporation to establish this and many other illegal tie-in agreements through the use of such loans, for the purpose of increasing U. S. Steel's share of the prefabricated house package market. This conspiracy is a violation of Section 1 of the Sherman Act and is also a conspiracy to monopolize in violation of Section 2 of the Sherman Act.

Summary Judgment procedures in antitrust cases involving charges of *per se* violations and conspiracy are and should be frowned upon and not allowed. The District Court erred in granting summary judgment and the case should be reversed and Petitioner granted a trial and full hearing.

ARGUMENT.

I. May a Federal Court in an antitrust suit charging a contract, combination and conspiracy to restrain commerce and an illegal tie-in agreement in violation of Section 1 of the Sherman Act and a conspiracy to monopolize in violation of Section 2 of the Sherman Act dismiss such a suit through Summary Judgment procedures when ample evidence was in the record to support all elements of the charges as set forth in the established cases?

The decision by the Sixth Circuit Court of Appeals to affirm the District Court's Opinion without giving the parties the benefit of an opinion significantly undermines the furtherance of antitrust enforcement by private litigation. There was a proper demand for jury trial in this case (56a), but the District Court took it upon himself to evaluate the evidence and dismiss Petitioner's suit on Respondents' Motion for Summary Judgment. The District Court actually acted as a trier of facts and the Court of Appeals has countenanced this action by its affirmance. There are significant questions of law and fact which appear in the record which should have precluded a Summary Judgment first sought eleven days before trial, and after four years of preparation.

To illustrate the erroneous nature of the proceedings on the Summary Judgment in this case, you need merely look at the "Findings of Fact and Conclusions of Law" (297a-309a) tendered by Respondents at the request of the District Court to realize that the Court was acting as a trier of facts. The District Court adopted those "Findings of Fact and Conclu-

sions of Law" verbatim on the antitrust issues and simply changed the title to "Memorandum Opinion-Judgment Dismissing Complaint and Amended Complaint" (309a-322a; App. A 33-46). This Opinion takes every *fact* most favorable to Respondents and uses those facts to support the dismissal and in the process ignores or brushes aside the evidence of the Petitioner. This is directly contrary to the principles laid down by this Court in *Poller* v. *Columbia Broadcasting System,* 368 U. S. 464, 7 L. Ed. 2d 458, 82 S. Ct. 486.

The issues presented in Petitioner's Complaint and evidence present serious questions of violations of Sections 1 and 2 of the Sherman Act. The Respondents were charged with ". . . a contract, combination and conspiracy in unreasonable restraint of and to monopolize . . . interstate trade and commerce in prefabricated houses and their component parts . . ." (21a). The Complaint goes on to specifically allege a conspiracy and concert of action to use the financing power of the Respondent Credit Corporation as a means of forcing dealers such as and including Petitioner to purchase the prefabricated houses of Respondent U. S. Steel (21a). The Complaint goes on to allege threats of foreclosure on the mortgages on Petitioner's property held by the Credit Corporation if Petitioner did not abide by the terms of the loan agreement requiring it to only purchase and build on said property U. S. Steel prefabricated homes (22a).

The loan agreement in paragraph 2. b. specifically obligates Petitioner as borrower to ". . . erect on

each of said Lots . . . a prefabricated dwelling house manufactured by United States Steel Homes Division, United States Steel Corporation" (26a).

Respondents have admitted over and over again that the Loan Agreements tied the purchase of the house packages to the lending of money for land purchase and development and the District Court throughout his opinion acknowledges that this was a tie-in contract.

What the District Court then proceeded to do was *evaluate* evidence and *misapply* the pertinent Supreme Court decision in finding as a matter of law no violation.

Throughout this case we have gained the impression from the District Court and the panel of judges who heard the oral arguments in the Sixth Circuit that we are attacking the use of financing or credit as it is normally used in the economy. This we definitely are not doing. Selling to customers on credit at all levels of business is an essential foundation of our economic structure. What we are attacking is the unusual use of credit under unique terms not available elsewhere as bait to get a borrower to sign loan agreements and mortgages which require that a third company's product be purchased which has no contractual relationship with the lender or borrower and no relationship to the security given the lender with threats of foreclosure on the mortgages if the products of the third party are not purchased and used. The day to day normal credit transaction certainly does not involve the type situation of which we do complain.

A predominant feeling that has been expressed at the oral arguments before the District Court and before the Sixth Circuit by the respective judges is that money when offered to finance a project under unique and unusual terms which cannot be obtained elsewhere cannot be used as a tying device. The attitude or feeling seems to be that one cannot accept such money under such conditions and later complain that restrictions under which the money is taken violate the anti-trust laws. While not expressed in such terms, this is merely another way of applying the *in pari delicto* doctrine. This inference that it was not quite right for Petitioner to file this suit permeates the District Court's memorandum Opinion (App. A 33-44) without it saying so directly.

This very proposition was argued by Respondents in their Brief before the Sixth Circuit of Appeals even though the District Court had rejected their tendered Amended Answer the morning trial was to begin (15a). The argument was stated by Respondents in said Brief as follows:

> "In the abstract, it ill behooves Fortner Corporation when the real estate market got slack, to turn on its benefactors who initially gave it a competitive advantage over other borrowers obtaining money through normal banking channels. It is this situation which gave rise to the tendered defense of pari delicto (39b) which the lower court did not entertain. The basis for this defense is Crest Auto Supplies, Inc. v. Ero Manufacturing Company, 360 F. 2d 896 (1966), decided May 20, 1966. Our pleading setting up this pari delicto

defense and grounded and on this authority was served on opposing counsel by mail, June 10, 1966."

Unfortunately we did not have at the District Court level or even in time for a Petition for Rehearing before the Sixth Circuit this Court's Opinion in *Perma Life Mufflers, Inc., et al.* v. *International Parts Corp., et al.*, 88 S. Ct. 1981, 20 L. Ed. 2d 982, handed down on June 10, 1968. In that case the franchise agreements between the plaintiffs and defendants imposed a number of restrictions including terms barring plaintiffs from purchasing from other sources of supply and tying the sale of mufflers to the sale of other products in the Midas line. The District Court gave Summary Judgment for the defendants and the Sevenuth Circuit Court of Appeals affirmed on the basis of the *in pari delicto* doctrine and on the basis that wholly controlled corporations cannot conspire, as was charged. This Court strongly disagreed and reversed.

In *Perma Life Mufflers, supra,* this Court anlayzed some of the evidence in the record including the fact that plaintiffs had attempted to obtain relief from the full line forcing and tying restrictions concerning the higher priced Midas line and had been adamantly refused and holds that such evidence establishes that the *illegal scheme* was forced upon plaintiffs. This Court also holds that the separate corporate defendants by availing themselves of separate corporate identity could not save themselves from the conspiracy charge even though there was common ownership.

Petitioner is firmly convinced that the Sixth Circuit would have reversed if the *Perma Life Mufflers* case, *supra,* had been available since the facts are similar and this Court finds such similar scheme to be illegal and sends that case back for trial.

In the present case Petitioner, Fortner Enterprises, Inc., was offered by Credit Corporation unusual and unique financing for land purchase and development, which could not be obtained elsewhere (Affidavit of Fortner, 29a; Affidavit of Horn, 294a), to induce Petitioner to agree to buy the prefabricated house packages of U. S. Steel and erect them in Petitioner's subdivision. There is ample proof in the record that Respondents conspired to do this insofar as Petitioner was concerned as well as to all others who borrowed money from Credit Corporation and that this was a principal means U. S. Steel had of getting a captive market and thus eliminating its competition. The Respondents have not argued or pled that the restrictions were reasonably necessary to ensure repayment. What they do say is that the restrictions would be eliminated and the mortgages on Petitioners' property released if Petitioners would pay them off.[2] The District Court accepted this argument (314a; App. 37, 39). This is merely an extension of the *"in pari delicto"* argument. This is the same as any of the illegal tie-in cases decided by this Court. The contracts could be cancelled and the restrictions thereby lifted, but this Court has

[2]This is not accurate since the mortgage (44a) requires Petitioner to perform each undertaking of the Loan Agreement and the Loan Agreement requires the erection of the U. S. Steel homes (26a).

never accepted such an argument and it is clear in the *Perma Life Mufflers* case, *supra*, why this is so. See also *Simpson* v. *Union Oil Company*, 377 U. S. 13, 12 L. Ed. 2d 98, 84 S. Ct. 1051.

The termination of a restrictive agreement does of course remove the restrictions, as Respondents argue. For example, if the dominant synthetic detergent brand were used as a tying product to force sales of a new or poor selling brand to grocers, some of the grocers could elect to do without the dominant tying brand and be relieved of the restriction. But this would be materially injurious to those making that election. The tying restriction was originally accepted to avoid such injury.

In the present case, the very nature and import of the evidence in the record is that Petitioner after the reputation of its subdivision began to go bad could not even have obtained the funds to pay off the Credit Corporation. Our case is therefore more extreme than the typical tie-in situation.

In the present case when the burden of the restrictions became known, Petitioner, through its President A. B. Fortner (290a), also tried on at least two occasions to formally obtain relief from such restrictions and was adamantly refused and told that there would be foreclosures if the houses of U. S. Steel weren't bought and built. The U. S. Steel product was defective (118a-128a, 290a-293a), in addition to being higher priced than that obtainable from other sources of supply (349a-353a).

Since the Sixth Circuit affirmed on the basis of the District Court's Memorandum Opinion (App. A 33-46), we must focus our attention on that opinion.

The District Court brushes aside the charge of conspiracy under Section 1 of the Sherman Act by stating "That the defendants did or did not conspire to achieve the tie-in contracts is of no consequence at this time" (314a; App. 39). The District Court apparently felt that the case depended solely on the legality or illegality of the tying agreement (315a; App. 40). This case should have been reversed out of hand on this point alone by the Court of Appeals.

We need only look at *United States* v. *General Motors Corporation*, 121 F. 2d 376, cert. denied, 314 U. S. 618, to find a case where a conspiracy to violate Section 1 of the Sherman Act was charged and upheld. In that case General Motors conspired with its wholly owned subsidiary G.M.A.C. to force the G.M.A.C. financing services upon dealers for the financing of the dealers' wholesale purchases and retail sales of General Motors automobiles. In that case General Motors used its economic power over its dealers to force the G.M.A.C. financing upon them. In the present case the Credit Corporation has used its economic power in the form of loans not available elsewhere at all or under the terms offered to force the purchase of U. S. Steel homes on the borrowers. See also *United States* v. *Yellow Cab Company*, 332 U. S. 218, 91 L. Ed. 2010.

The District Court ignores completely the charge of conspiracy to monopolize under Section 2 of the Sherman Act. No mention of that claim is made any-

where in his opinion. The Petitioner has consistently argued this cause of action and never abandoned any part of same, yet this charge has never been understood. There is ample evidence in the record that the Respondents conspired to achieve an increased share of the prefabricated home business by means of their financing programs to the damage of Petitioner and others. The Credit Corporation was originally established to provide financing to dealer builders of U. S. Steel but it was understood at the time of formation in 1954 that it would not be used as a means to force sales to them (756a). But this purpose was changed in 1958 (763a, 764a), when the Credit Corporation, under the direction of U. S. Steel's Finance Committee began to make loans to effectuate a minimum distribution of 1,800 house packages without conformity to conventional patterns of lending. This program was continued through the time Petitioner was signed up (764a-766a). U. S. Steel even guaranteed Credit Corporation's losses in writing from such ventures (764a), and included Petitioner in the guarantee.

This conspiracy was not confined to Petitioner but the Court ignores the evidence of the extent of said conspiracy. The Vice-President of the Credit Corporation in his deposition admitted that all loan agreements with all dealers had the purchase of U. S. Steel homes tied to the loan (870a, 871a). The President of the Credit Corporation has admitted that the Credit Corporation made loans consistently to aid U. S. Steel in its sales program of homes and which loans were unusual when regular banking and financial principles

are applied (832a). He has also admitted that he, as President of the Credit Corporation, made the decision to put the tie-in clause in the loan agreements with the knowledge of and under the direction of U. S. Steel (838a, 839a, 843a), the other alleged conspirator.

An excerpt from the U. S. Steel sales manual (381a, 382a), illustrates the special financing program as used by Respondents. It is even pointed out that the Credit Corporation turned down good loans when they couldn't produce sales because this would not accomplish the purpose of U. S. Steel. This closes (382a) with the statement "Financing is simply one of several tools that we (U. S. Steel) have available for securing more business."

The conspiracy to monopolize is further illustrated by the extensive nature and use of the loans to obtain sales. 68% of house package sales in 1960 involved loan agreements with the tie-in provision (676a, 677a). In 1960 the Credit Corporation made loans of over $22,000,000.00 to achieve sales which amounted to about $4,000,000.00. The same pattern is present for 1961 and 1962. In 1961, 70% of sales or about $2,900,000.00 were achieved as a result of such loan agreements involving loans of $19,300,000.00. In 1962, 75% of sales or about $2,300,000.00 of sales for the first nine months were achieved as a result of such loan agreements involving loans of $19,280,000.00 made during the first nine months. This is the exercise of naked economic power of itself, but the record contains more.

These loans were unique not only to Petitioner but to the other customers to whom they were presented.

All of the loans made were not bankable loans (857a), which means that normal channels of funds were not available to such borrowers. The terms of the loans were most important to many of the borrowers including Petitioner. The Respondents according to their own admissions went far beyond any competition by making higher percentage loans in relation to equity at more advantageous rates to the borrower. For example, the U. S. Steel Sales Manual indicates that competition charged simple interest plus a 10% fee while the Credit Corporation charged simple interest plus ½ point fee (377a).

Empire Homes, a Louisville competitor of U. S. Steel, which priced its home packages lower than U. S. Steel to Petitioner (350a), did not have the economic circumstance to make such loans on such terms in 1960 (295a), and therefore was excluded from competition for Petitioner's business as were the many suppliers of building materials which could have been used to build conventional homes.

The evidence of conspiracy to monopolize was surely one of fact for a jury under *United States* v. *Consolidated Laundries Corporation,* 291 F. 2d 563, 573 (2nd Cir. 1961), which holds that "intent" is an element of the offense and that an appreciable part of interstate commerce is the subject of the conspiracy. The Court holds at page 572 that $523,168.00 worth of business (1% of all such service) was substantial interstate commerce affected regardless of the percentage involved. See also *United States* v. *Yellow Cab Co.,*

332 U. S. 218, 225-226, 67 S. Ct. 1560, 1564, 91 L. Ed. 2010.

The cases also hold that a conspiracy to monopolize may be established without proof that the conspirators acquired the power to carry out the object of the conspiracy and without proof that monopolization was achieved. *American Tobacco Co.* v. *U. S.*, 328 U. S. 781, and *U. S.* v. *Griffith*, 334 U. S. 100.

The evidence of conspiracy in violation of Sections 1 and 2 of the Sherman Act and its effectuation is present in the record from the mouths of the Respondents and their documents. Yet the District Court passed by this claim and did not consider it. Can it be justice to dismiss Petitioner's claim as if it did not exist? Surely this Court cannot allow such procedures to exist in the lower courts.

II. When large and wealthy companies such as United States Steel Corporation and its credit subsidiary U. S. Steel Homes Credit Corporation lend money to borrower under unique and unusual terms not available elsewhere to obtain mortgages and loan agreements which require borrower (Fortner Enterprises, Inc.) ". . . to erect on each of said Lots . . . . a prefabricated dwelling house manufactured by United States Steel Homes Division, United States Steel Corporation . . ." is there created an illegal tying agreement in violation of Section 1 of the Sherman Act?

We now turn to that portion of this case upon which the District Court did pass. We would repeat that the fact that the loan agreements contained a tie-in clause is admitted by Respondents and acknowledged by the District Court in his opinion. The District

Court and Court of Appeals have failed to properly apply the controlling Supreme Court decisions to the facts in the record and this is a compelling reason for the granting of this Petition. The misapplication and interpretation of the law concerning tie-in cases must be rectified by this Court for uniform interpretation of the Antitrust laws and for justice to this Petitioner.

The basic law on tie-in violations is found in *International Salt Company* v. *United States,* 332 U. S. 392, 92 L. Ed. 20, where lessees of salt processing machinery were required by their leases to buy the salt used in the machinery from International Salt Company. $500,000.00 of salt per year was involved in the tie-in. This Court held such amount of commerce in the tied product not insignificant nor insubstantial and found the leases *per se* violations of Section 1 of the Sherman Act as illegal tie-in devices.

Northern Pacific Railway Company v. *United States,* 356 U. S. 1, 2 L. Ed. 2d 545, then speaks of tie-in arrangements as follows at 2 L. Ed. 2d 550:

> "They are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected."

Northern Pacific, supra, then given a very pertinent discussion of the *International Salt* case (2 L. Ed. 2d 552):

> "In our view International Salt Co. v. United States, 332 U. S. 392, 92 L. Ed. 20, 68 S. Ct. 12,

which has been unqualifiedly approved by subsequent decisions, is ample authority for affirming the judgment below. In that case the defendant refused to lease its salt-dispensing machines unless the lessee also agreed to purchase all the salt it used in the machines from the defendant. It was established that the defendant had made about 900 leases under such conditions and that in the year in question it had sold about $500,000 worth of salt for use in the leased machines. On that basis we affirmed unanimously a summary judgment finding the defendant guilty of violating § 1 of the Sherman Act. The Court ruled that it was 'unreasonable, per se, to foreclase competitors from any substantial market' by tying arrangements. As we later analyzed the decision, it was not established that equivalent machines were unobtainable, it was not indicated what proportion of the business of supplying such machines was controlled by defendant, and it was deemed irrelevant that there was no evidence as to the actual effect of the tying clauses upon competition.' Standard Oil Co. v. United States, 337 U. S. 293, 305, 93 L. Ed. 1371, 1381, 69 S. Ct. 1051.

"The defendant attempts to evade the force of International Salt on the ground that the tying product there was patented while here it is not. But we do not believe this distinction has, or should have, any significance. In arriving at its decision in International Salt the Court placed no reliance on the fact that a patent was involved nor did it give the slightest intimation that the outcome would have been any different if that had not been the case. If anything, the Court held the challenged tying arrangement unlawful despite the

fact that the tying item was patented, not because of it. 'By contracting to close this market for sale against competition, International has engaged in a restraint of trade for which its patents afford no immunity from the antitrust laws.' 332 U. S., at 396. Nor have subsequent cases confined the rule of per se unreasonableness laid down in International Salt to situations involving patents. Cf. United States v. Griffith, 334 U. S. 100, 92 L. Ed. 1236, 68 S. Ct. 941; United States v. Paramount Pictures, Inc., 334 U. S. 131, 156, 92 L. Ed. 1260, 1291, 68 S. Ct. 915; Times-Picayune Publishing Co. v. United States, 345 U. S. 594, 79 L. Ed. 1277, 73 S. Ct. 872."

The District Court stops at this point and interpolates the language of the above cases to mean that there must be monopoly power or a high degree of economic control in the market over the tying product. But these cases speak only of "sufficient economic power" over the tying product to restrain competition in the tied product. The later Supreme Court case of *United States* v. *Loew's Inc.*, 371 U. S. 38, 9 L. Ed. 2d 11, has further clarified the law on this point. In that case this Court held:

"Market dominance—some power to control price and to exclude competition—is by no means the only test of whether the seller has the requisite economic power. Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes."

On that same page, footnote 4 states in pertinent part:

> "Since the requisite economic power may be found on the basis of either uniqueness or consumer appeal, and since market dominance in the present context does not necessitate a domination of market power in the sense of Section 2 of the Sherman Act, it should seldom be necessary in a tie-in case to embark upon a full-scale factual inquiry into the scope of the relevant market for the tying product and into the corollary problem of the seller's percentage share in that market."

The District Court ignored the *Loew's* decision (317a, 318a), and the Petitioner's evidence on this element. Petitioner's evidence was that the financing offered Petitioner by Credit Corporation was so unusual and unique that economic circumstances compelled the acceptance of the restraints in the loan agreements (Affidavit of A. B. Fortner, 290a), and such financing under such terms was not available elsewhere at that time (Affidavit of Horn, 294a). The President and Vice-President of the Credit Corporation admitted that their loans were to obtain business for U. S. Steel and were not loans which the borrowers could obtain from conventional sources (832a, 852a, 857a). Obviously this financing meets the test of the *Loew's* case, *supra,* and must be construed most favorably to Petitioner on a Motion for Summary Judgment. But what did the District Court say? He found as a matter of law (318a, App. A 47-48), that the uniqueness in terms was of no significance and that others

"could" have lent money to Petitioner on the same terms. But there is not one scrap of evidence in the record to support that conclusion. The evidence was that money under such terms was *not* available elsewhere at that time! (290a-293a, 294a).

Even if loans under the same or similar unique terms "could" have been obtained elsewhere, this Court in its analysis of the *International Salt* case, *supra,* in the *Northern Pacific* decision, *supra,* at page 552, has pointed out that it is not necessary to consider whether equivalent tying products were available.

One of the key issues then is the holding that loans under unique and unusually favorable terms cannot be a tying element of an illegal tying agreement. The opinion (318a; App. A 47) recognizes that the financing was unique to Petitioner but holds that it must be generally unique and attractive in the market place to result in the requisite economic power. No authority is cited for this holding and it flies in the face of the *Loew's* decision, *supra,* which finds the requisite economic power in the tying product's desirability to consumers or from uniqueness in its attributes, *United States* v. *Loew's, Inc.,* 371 U. S. 38, 45, 9 L. Ed. 2d 11, 18, and even more strongly in the Sixth Circuit's own decision in *Associated Press* v. *Taft-Ingalls Corporation,* 340 F. 2d 753, cert. denied 382 U. S. 320, where the A. P.'s Ohio wire service was found unique to Taft-Ingalls Corporation to the point that the requisite economic power was found. Clearly the Ohio wire service was not generally unique to all customers.

There was evidence in the record which would have at least raised a jury issue as to the general uniqueness of the special financing plans offered by the Credit Corporation. The Sales Manual described their loans as being on better terms than those of competitors.

Mr. Horn has testified that loans on such terms were not available to Petitioner or anyone else at the time they were made (294a). Again the District Court has merely accepted Respondents' facts and law and ignored Petitioner's evidence.

This decision and the Sixth Circuit's affirmance is contrary to the holding in *Trans-World Airlines, Inc.* v. *Hughes,* 332 F. 2d 602, 611 (1964), cert. dismissed 380 U. S. 248, 249, which holds that the pleading, which charged the defendant, Hughes Tool Company, with conditioning its financing to T.W.A. on T.W.A. only purchasing its airplanes from Hughes, on its face charged an illegal tying agreement under the Antitrust laws and stated a claim, thus establishing jurisdiction.

It is respectfully submitted that proper application of the applicable cases to the facts of record show that there was sufficient evidence of economic power over the tying device to at least submit the case to a jury trial.

III. Is a minimum of $678,000.00 of sales or obligations to purchase of a tied product a not insubstantial amount of interstate commerce to satisfy the second element of an illegal tie-in agreement and should the Federal Courts have applied a share of the market test to a case involving a tie-in agreement?

The District Court then goes into the second element of an illegal tying agreement (318a). Here the Court applies to the amount of interstate commerce restrained a relevant market concept, using as its authority an inapplicable case (319a). This case, *Tampa Electric Co.* v. *Nashville Co.*, 365 U. S. 320, was not a tie-in case and therefore did not involve the *per se* rule. It applied a relevant market test to a requirement contract. There was no tying of one product or service to another. It carefully distinguishes tie-in cases (365 U. S. 320, at p. 334), and states (365 U. S. 320, at p. 326), that the necessity of direct proof of economic impact of a tying contract is not required (share of relevant market affected), as is required when a requirements contract is being considered.

The District Court says that a tying contract must create a substantial restraint on interstate commerce in the tied product (318a). The law under the Supreme Court cases is that a "not insubstantial" amount of commerce must be restrained, *i. e.*, it must not be *de minimus, International Salt Co.* v. *United States, supra.* The Court recognizes that house packages were the tied product but refuses to consider dollar sales figures of house packages. Instead, the Court speaks of the number of acres of land restrained

in the context of a share of the market of land available, although this is not even the tied product.

This was a completely improper application of the law and facts again. All of the cases dealing with violations of Section 1 of the Sherman Act which involved illegal tie-in arrangements hold that a relevant market concept is not applicable., *International Salt, supra,* involved $500,000.00 of sales of salt restrained and this has been repeatedly held sufficient. The District Court has not even concerned himself with the restraint in the sales of house packages. It is uncontradicted in the record (241a), that Petitioner was obligated to purchase 219 house packages from U. S. Steel as a result of the transactions complained of. The record also shows that the least expensive house package Petitioner had to purchase cost in excess of $3,100.00 each (349a-352a), which means that on this transaction alone at least $678,900.00 of commerce was restrained. But the evidence referred to previously also shows that the restrictive loan agreements involved 68% of sales or $3,971,217.76 in 1960, 70% of sales or $2,823,383.50 in 1961, and 75% of sales or $2,289,819.00 in 1962.

Certainly when a Summary Judgment is involved this evidence cannot simply be ignored by the Court. Certainly it meets the proper tests of this Court's decisions and at least created a question of fact if viewed against Respondent's evidence about the number of acres of land involved.

Money is the source of power in this country. Money in the right quantity or under the right circumstances can be used to achieve almost any goal. The

use of money in a unique way can achieve an economic hold on an individual or company as great or greater than that hold achieved by control over a patented product, a franchise, copy-right or trademark and therefore our antitrust law should limit the indiscriminate use of money in the manner. Availability of money is a prime consideration and concern of our entire business community. No one questions the right of one lending money to obtain reasonable security for repayment. When restraints are imposed through the power of money which do not affect the security of the loan, these may or may not be illegal depending on whether there is economic coercion through the particular circumstances of the borrower to take the money offered. We can illustrate this principle as follows. If a particular Corporation A making and selling Product X in the United States has a Customer B buying $250,000.00 of Product X from it learned that that Customer B was in need of financing and could not obtain it at reasonable rates from other financial sources, then Corporation A could arrange directly or through a subsidiary or some lending institution to loan that Customer B the funds required at attractive terms for the customer. Adequate security could be obtained. If that Corporation A as a condition of that loan required that Customer B buy $750,000.00 of Product X from Corporation A, is this not achieving the very pernicious result the Sherman Act was designed to prevent. Competition for the sale of Product X to that customer is stifled, and customer B's free choice of lower price from others has been eliminated. Corpora-

tion A could also obtain new customers in this same manner.

Why should a company itself or especially through another have any more right to impose restraints upon Petitioner and others through a loan of money than they would be able to do under any other contract or arrangement? Petitioner submits that the right does not exist. *Goodyear Tire and Rubber Co.* v. *F. T. C.*, 381 U. S. 357, 85 S. Ct. 1498 (1965). Under the District Court's theory as adopted by the Sixth Circuit, a contract setting up the terms under which money will be loaned can impose a tie-in restriction for the benefit of a third party. The logical extension of that theory would be the allowance of resale price maintenance, prohibition of the borrower to engage in business elsewhere, or any other conceivable restraint through loan documents.

In the *Perma Life Mufflers* case, *supra,* the attraction of the Midas brand and advertising program was so great that the plaintiff through economic necessity accepted the restraints in the franchise agreement. In the present case the attraction of financing particularly on terms not available from other sources was so great that Fortner Enterprises, Inc., accepted the restrains in the loan agreements. The argument was made in *Perma Life Mufflers* that when plaintiffs voluntarily signed the contracts they barred themselves from suit. The same argument has been made by the Credit Corporation and U. S. Steel here. This Court has strongly disposed of that argument, finding it completely invalid. There was evidence of coercion which

the courts below in both cases ignored but which this Court indicates is of great evidentiary import. In *Perma Life Mufflers* the threat was to cancel the franchises, thus depriving plaintiffs of use of the Midas name and other benefits, but there was no threat that any of plaintiffs' property would be *taken*. In Fortner Enterprise's case the threat was to foreclose on the mortgages and to take or have sold Petitioner's property because Petitioner had been forced into an untenable position due to the tie-in agreement since the tied products were overpriced and defective. These were the very conditions which were created by the Respondent U. S. Steel, the beneficiary of the conspiracy and tie-in agreement.

CONCLUSION.

Petitioner submits that its evidence establishes as a matter of law an illegal tying agreement which is a *per se* violation of Section 1 of the Sherman Act and a conspiracy to enforce that agreement and to monopolize the sale of prefabricated houses in violation of Sections 1 and 2 of the Sherman Act. The law in these areas should be clarified and the *per se* nature of a tie-in agreement affirmed, since enforcement of the antitrust laws by private enforcement has been affected by the holdings of the District Court and the Sixth Circuit Court of Appeals.

The holding and order of the Sixth Circuit Court of Appeals affirming the District Court should be reversed with directions that the District Court's judg-

ment be reversed and set aside and that Petitioner be granted a trial.

We respectfully submit that if the evidence at the trial on the issues of liability are the same as is now in the record, then Petitioner would be entitled to a directed verdict on such issues, with only the question of damages to be resolved by a jury.

Respectfully submitted,

KENNETH L. ANDERSON,
WOODWARD, HOBSON & FULTON,
1805 Kentucky Home Life Building,
Louisville, Kentucky 40202,

A. SCOTT HAMILTON, JR.,
HAMILTON, HOPSON & HAMILTON,
312 W. Liberty Street,
Louisville, Kentucky 40202,

Attorneys for Petitioners.

[APPENDIX A]

MEMORANDUM OPINION—JUDGMENT DISMISSING COMPLAINT AND AMENDED COMPLAINT.

Preliminary Statement.

This is a civil anti-trust action brought under the Clayton Act, §§ 4 and 16, 38 Stat. 731, 737, 15 U.S.C. §§ 14 and 26, for alleged violation by the defendants of Sections 1 and 2 of the Sherman Act, 26 Stat. 209, 15 U.S.C. §§ 1 and 2. Although the complaint states that the action is instituted under 15 U.S.C. § 14, which is Section 3 of the Clayton Act, plaintiff now asserts that this was a typographical error. For the purpose of deciding the motion before the Court, this representation of the plaintiff has no bearing however in view of the court's opinion as set forth below.

The case is before the Court upon a motion for summary judgment for defendants, pursuant to Rule 56 of the Federal Rules of Civil Procedure and involves the legality of a provision in two loan agreements between the plaintiff, Fortner Enterprises, Inc. and U. S. Steel Homes Credit Corporation (sometimes hereinafter Credit Corporation), requiring plaintiff to erect a prefabricated dwelling house manufactured by United States Steel Homes Division (sometimes hereinafter Homes Division) of United States Steel Corporation (sometimes hereinafter Steel Corporation) on each of 219 lots in Jefferson County, Kentucky, with respect to which Credit Corporation agreed to loan money to plaintiff to assist in the acquisition and development of the property and the construction of dwellings. The first loan agreement, dated October 28, 1960, involved 187 lots, and was the subject of the plaintiff's original complaint, filed July 19, 1962. The second loan agreement, dated August 2, 1961, involved 32 lots, and was included within plaintiff's amended complaint, filed January 21, 1966.

Statement of the Case.

Plaintiff, in the early part of 1960 was a dormant corporation with a substantial (over $16,000) deficit. It was owned entirely by A. B. Fortner, Jr., of Louisville, Kentucky, with the possible exception of one share of common stock held by Mr. Fortner's wife. Until October 27, 1960, it was not authorized to engage in the building or real estate business. The defendant United States Steel Corporation had its manufacturing plant in New Albany, Indiana across the Ohio River from Louisville, Kentucky. There its Homes Division manufactured component parts for prefabricated dwelling houses. The component parts of prefabricated dwelling houses, sometimes called "home packages," are sold by the defendant Steel Corporation generally throughout the United States east of the Mississippi River and in a tier of states just west of that river. The defendant Credit Corporation is a wholly owned subsidiary of the other defendant Steel Corporation. Its sole business function is to furnish financial assistance to customers or dealers of the parent corporation's Homes Division, in instances in which they apply for such assistance and seem to be unable to obtain the same sort of assistance on reasonable terms from normal sources. The underlying purpose of the Credit Corporation's function is to enable its parent, in the sale of home packages, to compete with other building material manufacturers, sellers, lumber yards, brick factories and other prefabricated house manufacturers, who provide similar assistance to their customers.

With this background of the general situation, the court now turns to the precise point in issue which is whether the defendants, parent and subsidiary, allegedly "conspired to establish an unlawful tying agreement between the defendant Credit Corporation and the plaintiff Fortner Enterprises, Inc., which required the plaintiff to purchase and build homes manufactured and sold by U. S.

Steel Corporation in plaintiff's subdivision in violation of Sections 1 and 2 of the Sherman Act." See Paragraph 1, Plaintiff's tendered instructions furnished the court pursuant to pre-trial order. In the light of this succinct statement of the plaintiff's basic claim, the court now examines in more detail the uncontroverted facts surrounding the execution of the first question contract, dated October 28, 1960. Shortly prior to that date plaintiff was a dormant corporation, controlled by A. B. Fortner, Jr. and had a substantial financial deficit. The defendant Homes Division was in the business of selling home packages. Plaintiff had available to it property in Jefferson County, Kentucky, suitable for subdivision purposes. This property was readily available to plaintiff because of Mr. Fortner's interest in another corporation then holding title to same. The plaintiff however had no funds to purchase or develop land or purchase home packages or otherwise build homes or indeed engage in any business. There were ample funds available in Louisville, Kentucky during 1960 for borrowers. From local sources alone the figure exceeds $163,330,000. In addition to this figure $133,316,000 in real estate mortgages were recorded in Jefferson County, Kentucky in 1960. Credit Corporation had no monopoly or "corner" on money at that time, nor does plaintiff contend to the contrary. Mr. Fortner was not then disposed to provide plaintiff with funds from any other source, including a personal investment, but instead applied for money from the Credit Corporation with which to buy property from the other corporation in which it had an interest. Thereafter plaintiff, using funds also borrowed from the Credit Corporation completed or at least partially completed the development of that property. And finally, again using funds borrowed from the Credit Corporation, constructed homes on part of the property thus acquired and developed utilizing in the construction thereof home packages pur-

chased from the Steel Corporation. Plaintiff concludes in affidavits fufnished by it that all of this was to the sole advantage of the defendants. The court finds however that in this particular transaction, (as in most transactions), both parties to the transaction felt it would be to their mutual advantage. Certainly the plaintiff was not coerced nor compelled to enter into the contract about which it now complains. Prior to the execution of the first contract it was not transacting any business of substance and entered into the arrangement with the expectation that it would be profitable to it.

The particular transaction is evidenced by three types of written documents. There are notes which are evidence of the debts incurred or to be incurred as funds were advanced. There is a mortgage in recordable form and a loan agreement which is the tie-in contract about which plaintiff now complains. All of these three types of documents are part of the same transaction. Indeed the loan agreement on its face recites that these documents constitute the "agreement" between the parties. The loan agreement in substance requires that while there is money due the Credit Corporation from the plaintiff, the property encumbered by the mortgage shall be developed with single family dwellings utilizing as a component part thereof home packages purchased from the United States Steel Corporation, Homes Division. The property encumbered by the mortgage and hence subject to the provisions of the loan agreement consisted of approximately 55 acres in Jefferson County, Kentucky. At the time this contract was made, Jefferson County, Kentucky contained approximately 240,000 acres, of which approximately 171,484 acres were suitable for subdivision into single family lots or were then being so developed. In essence the arrangement between the plaintiff and the Credit Corporation is one of borrower-lender, with the lender imposing certain restrictions on the

plaintiff's property purchased with the borrowed funds, but only while the debt remains unpaid. For our purposes here, the principal restriction while the debt is outstanding is the requirement that plaintiff utilize home packages purchased from the Credit Corporation's parent, when it constructs dwellings on the 55 acres purchased and developed with funds obtained from the Credit Corporation. The loan agreement is not an exclusive dealing contract within the normal use of that term. Plaintiff is not prohibited from purchasing prefabricated homes from the Steel Corporation's competitors or building conventional homes or engaging in any other business, competitive to the defendants or not, except on the 55 acres here involved. The day following the execution of this loan agreement, plaintiff under a similar arrangement with defendants' competitors, could well have purchased additional property, developed it and built homes on it, in competition with the defendants. At any time, plaintiff could have liquidated the debt to defendant Credit Corporation and be relieved from all obligation to it, including the restriction or encumbrance affecting the 55 acres.

On October 31, 1960, plaintiff entered into a franchise contract with the Homes Division. But none of this transaction between the plaintiff and the defendant Credit Corporation affected in any way that franchise with the Homes Division. The Homes Division would sell home packages to anyone who could pay for same. It was not a requirement to become a franchise dealer or to buy home packages that any would be purchaser, including plaintiff, borrow money from the Credit Corporation. Nor was it a requirement if the would be purchaser, including plaintiff, needed to borrow money that it borrow money from the Credit Corporation. Nor would the plaintiff or any other franchise dealer lose his franchise because having once borrowed from the Credit Corporation, it liquidated that debt. In short, the transaction before the court is simply one in

which certain restrictions as to use were placed on 55 acres of land in Jefferson County, Kentucky, while there was an outstanding debt in connection with the purchase and development of that property. There is no general restriction on the plaintiff nor any change in the situation as a result of the debt's liquidation, except that all restrictions are removed.

The same general facts relate to the second of the two questioned contracts, which was executed October 2, 1961, except that there, only an additional 7.3 acres were involved and the plaintiff had been engaged in the development of the subdivision acquired with the proceeds of the first loan for about seven months.

No additional facts were suggested or offered at or prior to the hearing on defendants' motion for a summary judgment which would alter the basic facts outlined above. There can be no dispute as to the facts derived from the various contracts and documents since they speak for themselves. The size of the property restricted was not questioned. Therefore the court is compelled to the conclusion that the case is one for decision on summary judgment. That the defendants did or did not conspire to achieve the tie-in contracts is of no consequence at this time. It is the contracts themselves which give rise to and furnish the basis for plaintiff's claim. If these contracts do not meet the tests determining violations of anti-trust acts, then they can furnish no claim for damages for a violation of the anti-trust laws, regardless of any other damage, real or imagined, flowing therefrom. Those claims simply may have become claims for breach of contract or related claims but are not within the purview of the anti-trust laws.

Conclusions of Law.

The abandonment of a claim under the Clayton Act only serves to increase plaintiff's burden since that later statute is broader in its concept, and conduct which would

violate Section 3 of the Clayton Act need not violate Sections 1 and 2 of the Sherman Act. This proposition is found conversely stated in the closing paragraph of Tampa Electric Co. v. Nashville Co., 365 U. S. 320. This abandonment or "erroneous" complaint regarding Section 3 of the Clayton Act is of small consequence however since the court is of the opinion that the allegedly illegal tie-in contracts do not fall "within the broader prescription of § 3 of the Clayton Act" and hence do not violate the provisions of the Sherman Act on which plaintiff now professes to rely. Tampa Electric Co. v. Nashville Co., supra; Times Picayune Publishing Co. v. United States, 345 U. S. 594.

On its face, the complaint is at variance with the Exhibit Loan Agreement (the questioned contract) filed as an exhibit thereto. The complaint will be controlled and modified by the terms of the written exhibit on which plaintiff bases its causes of action. Consolidated Jewelers, Inc. v. Standard Financial Corporation, 325 F. 2d 31; Ingram v. State and Building Corporation, Ky., 309 S. W. 2d 169. It is desirable in a summary judgment proceeding to have the issues set forth in the complaint made clear. The complaint thus modified by its exhibit, alleges that a condition for borrowing money from the Credit Corporation is that plaintiff will use home packages purchased from the Steel Corporation in the construction of homes on the 55 acres in Jefferson County, Kentucky, bought and developed with Credit Corporation's fund while the debt is outstanding. Reference is made to the Findings of Fact hereinabove set forth.

The amended complaint likewise must be modified by the Exhibit Loan Agreement, which by reference is incorporated as a part of it.

It is these loan agreements which plaintiff claims are illegal tie-in contracts, violative of Sections 1 and 2 of the Sherman Act. The fact of conspiracy or lack of it, sur-

rounding or related to the execution of these contracts has no bearing on the matter at this point. If the contracts are illegal under the facts attendant thereto, then plaintiff has a cause of action and may then proceed to prove conspiracy. And if successful in this endeavor to prove the damage flowing therefrom.

The court will only discuss in detail the earlier contract, executed in 1960. It will not be necessary to discuss the later (1961) contract, since it is similar to the earlier contract and for the reasons herein stated, the court's views on the earlier contract apply with equal vigor to the second and later contract, brought into this case by an amended complaint.

Tie-in contracts have been the subject of both public and private litigation. By public, the court means litigation instituted by the United States Government in enforcement of the anti-trust laws and by private the court means actions such as we have here. The United States Government has taken no part here, even earlier by civil or criminal action as sometimes happens. Even though the anti-trust laws expressly provide for private redress if those laws are violated, it still must be borne in mind that the ultimate aim is public good, "for it is the theory of the anti-trust laws that the long run advantage of the community depends on the removal of restraints upon competition." Standard Oil of California v. United States, 337 U.S. 293. This is not to say that there are different standards between public and private litigation (unless expressly provided which is not the case here) in the general enforcement of the anti-trust laws, but clearly it is not the purpose of the anti-trust laws to furnish treble damages where there have been only ordinary breaches of contract, conspiracies to injure reputation or property, etc.

There are two distinct elements or parts of a tie-in contract, both of which must violate the anti-trust laws before

such a form of contract can be the basis for a claim under those laws. A contract may be offensive as to one element or the other, yet not furnish the basis for an anti-trust action. Both requirements must be met. These contracts "are unreasonable in and of themselves wherever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a not insubstantial amount of interstate is affected." Northern Pacific Railroad Co., v. United States, 356 U. S. 1. Phrased another way, to make a tie-in contract illegal, the offender must possess "monopoly power or, at the very least a high degree of economic control in the market for the tying service and" the tie-in result in a "substantial restraint upon competition in the market for the tied service." Centanni v. Smith & Son, Inc., 216 F. Supp. 330. See also International Salt Company v. United States, 332 U. S. 392 and Times-Picayune Publishing Co. v. United States, 345 U. S. 594. The court will discuss the elements of a tying contract in the order indicated. Here money from the Credit Corporation is the tying product and home packages sold by the Steel Company are the tied product.

Obviously and as indicated in the court's Statement of the Case, the defendant Homes Corporation does not enjoy a monopoly of, nor a patent on money. Plaintiff argues, because of its financial plight at the time it made the contract, Credit Corporation's agreement to 100% financing was so unique that this was tantamount to monopoly power or a high degree of control of the tying product. Credit Corporation's generosity to the plaintiff does not go to the availability of the tying product in the market place and obviously others, if they chose, could lend to plaintiff money on the same terms and conditions as defendant Credit Corporation. Simply stated, a plan or proposal for the generous use of the tying produce (money) is not equivalent

to economic power with respect to the tying product. The test set in the cited cases is not met simply by contending the proposal for the use of the tying product is more generous than others may propose. The unique feature of Credit Corporation's plan and its attraction for the plaintiff is not general and it must be general in the market place to fulfill the requirements found in the cited cases. Indeed many people may not find Credit Corporation's arrangement with plantiff attractive. They may not desire the restrictions or find them useful. If, however, Credit Corporation enjoyed monopoly or a high degree of economic control in the market for money, others would have no choice but to adopt the plan. The test is universal compulsion not a peculiar attraction for one corporation as here. This singular attraction does not create market dominance or economic control over the product in and of itself and "of course where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item any restraint of trade attributable to such tying arrangements would obviously be insignificant at most." Northern Pacific Railroad Co. v. United States, supra. This principle leads logically to consideration of the second element required to be found in an illegal tie-in contract.

To be bad under the anti-trust laws the contract must also create a substantial restraint on competition involving the sale of the tied product (home packages). If the relevant market concept as to the restriction found in the contract would relate to the area in which the defendant Steel Corporation competed, comparison between the 55 acres affected and the total area in which the Steel Corporation competes in the sale of its home packages becomes ludicrous. Tampa Electric Co. v. Nashville Co., supra. Being more realistic, since plaintiff conducts only a local operation, the court feels the geographical comparison for the

effect on interstate commerce should be made between Jefferson County Kentucky, and the encumbered 55 acres. But even here the discrepancy between the restricted property and the portion of the county available for development is great. Only .00032% of the available area in the county is affected by the contract. To further lessen the strain, if any, on competitive restraint, the loan agreement does not prohibit plaintiff generally from purchasing competitive products from others and it permits complete competition when the indebtedness to the Credit Corporation is liquidated. All of this without effect on plaintiff's franchise contract with the Steel Corporation.

Hypothetical illustrations of possible situations under the present contract, as it affects competition, will demonstrate the weakness and minimal effect of it on competition. Suppose the Steel Corporation produced a markedly inferior product and was unable to sell it without some sort of a tie-in device and (here the court assumes Credit Corporation has a monopoly on money). The present arrangement captures for the defendants certain territory (55 acres) in Jefferson County, Kentucky, leaving to the general public 99.99968% of that county in which to build homes purchased from Steel Corporation's competitors. This could include purchases through the medium of the plaintiff itself since it was not generally restricted. Thus, both the general public and the defendant's competitors have practical freedom of choice in Jefferson County, Kentucky. A second illustration will indicate the fallacy of claiming that it is the market for single dwellings or even in a more restricted sense, prefabricated single family dwellings, from entering into the concept. Assume the absurd but legally possible situation in which Jefferson County, Kentucky's market for single family or prefabricated single family dwellings was only one such dwelling unit annually. In the situation before the court, the poten-

tial buyer of that single family dwelling unit from plaintiff, or from others in competition with plaintiff, or directly from suppliers in competition with the defendant Steel Corporation, or anyone, has 99.99968% of the county in which to locate the home and fulfill his needs. In summary, the restriction here fails to "suffer the qualifying disability" which is a "tendency to work a substantial—not remote—lessening of competition in the relevant competitive market." Tampa Electric Co. v. Nashville Co., supra.

For the foregoing reasons, the courts concludes as a matter of law that the contract fails to meet either of the requirements necessary for it to be illegal under the antitrust laws.

Other Matters.

The affidavit of Albert F. Reutlinger is ordered filed of record herein, there being no objection on the part of plaintiff.

Defendant's tender of an amended answer setting up a Fourth Defense, that of pari delicto, served by mail on plaintiff's attorney June 10, 1966 comes too late and this amended answer will not be permitted to be filed.

In view of the court's decision on defendants' motion for a summary judgment, it is not necessary that it consider or rule on other pending motions made by the defendants directed to the amended complaint, nor does it rule on any of the objections made by the defendants to certain exhibits which plaintiff indicated it would tender at the trial of the case.

Plaintiff's counsel, several days after the hearing on defendants' motion for a summary judgment, tendered his affidavit and that of Herman Miles, to be considered in connection with that motion. This is too late. These affidavits should have been filed prior to the day of the hearing to be considered. See Rule 56. They may not now be filed.

The content of these affidavits however, had they been considered, is such as would not affect the court's decision on the summary judgment.

During the course of the recent hearing, plaintiff suggested that the judgment entered January 15, 1964, in Action Number 4392-A, styled Fortner Enterprises, Inc. v. U. S. Steel Homes Credit Corporation was not final and would be appealed. The record discloses that this companion case arose out of a counterclaim by defendant U. S. Steel Homes Credit Corporation to obtain a judgment for the funds advanced and to foreclose the mortgage securing the debt then in default. After the issues were joined by reason of the counterclaim, this court entered an order separating the trial of the within anti-trust action from the mortgage foreclosure action. Thereafter, in the mortgage foreclosure action certain issues were raised and resolved by a judgment. This judgment finally and fully disposed of all issues between the two parties to Action Number 4392-A in this court, styled Fortner Enterprises, Inc., Plaintiff v. U. S. Steel Credit Corporation, Defendant. Judge Shelbourne, now Senior Judge of this court, entered the judgment in that foreclosure action. It is his opinion and belief, and in it the court concurs, that the judgment entered in that separate foreclosure action was a final judgment and subject to appeal from and after the date of its entry, since it disposed of all issues then pending between the parties to that separate action.

CONCLUSION.

Plaintiff's motion to have the affidavits of Kenneth L. Anderson and Herman Miles filed is overruled. They may be tendered.

Defendants' motion to have the court order its amended answer tendered July 6, 1966 filed of record is overruled. No order is entered on other pending motions, except on defendants' motion for a summary judgment. This motion

for a summary judgment is sustained, and the complaint and the amended complaint are dismissed, plaintiff to pay all costs.

James F. Gordon
Judge

A Copy: Attest
Martin R. Glenn, Clerk
By F. Allen
Deputy Clerk

September 7, 1966
Emphasis supplied.

JUDGMENT.

It Is Ordered And Adjudged that defendants' motion for summary judgment is hereby sustained; the complaint and the amended complaint are dismissed with prejudice, that the plaintiff take nothing, and that the defendants, United States Steel Corporation, and U. S. Steel Homes Credit Corporation recover of the plaintiff, Fortner Enterprises, Inc. their costs of action.

James F. Gordon
United States District Judge

September 8, 1966

[APPENDIX B]

No. 17546

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

Fortner Enterprises, Inc., - - Plaintiff-Appellant,

v.

United States Steel Corporation, and
U. S. Steel Homes Credit Corporation, - - - - - - Defendants-Appellees.

Before: Edwards and Peck, Circuit Judges, and McAllister, Senior Circuit Judge.

ORDER—Filed April 26, 1968.

The above cause coming on to be heard on the briefs of the parties, the transcript of the record, and the argument of counsel in open court, and the court being duly advised; now, therefore, it is hereby ordered, adjudged and decreed that the judgment of the District Court be and is hereby affirmed for the reasons set forth in the memorandum opinion of Judge James F. Gordon.

Entered by order of the court

(s) Carl W. Reuss
Clerk

[APPENDIX C]

Section 1 of the Sherman Act, 15 U.S.C. 1:

§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof,

shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

* * * * * * *

Section 2 of the Sherman Act, 15 U.S.C. 2:

§ 2. Monopolizing trade a misdemeanor; penalty.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

* * * * * * *

Section 4 of the Clayton Act, 15 U.S.C. 15:

§ 15. Suits by persons injured; amount of recovery.

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

* * * * * * *

Section 16 of the Clayton Act, 15 U.S.C. 26:

§ 26. Injunctive relief for private parties; exception.

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. Oct. 15, 1914, c. 323, § 16, 38 Stat. 737.

* * * * * * *